(1)
FILED
OFFICE COPY
04-908 DEC 30 2004
ATTORNEY GENERAL
No.
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ERNIE ROE, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
RHONDA L. CARTWRIGHT-LADENDORF*
Supervising Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2106
Fax: (619) 645-2581
Counsel for Petitioner

QUESTIONS PRESENTED

1. Is a federal habeas corpus petitioner who claims he was incompetent to stand trial in state court and seeks a federal evidentiary hearing on the competency claim excused from the requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of such hearings?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTION, STATUTES, OR REGULATIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
I. THE NINTH CIRCUIT'S HOLDING THAT A HABEAS APPLICANT WHO ALLEGES HE WAS INCOMPETENT TO STAND TRIAL IS EXCUSED FROM MEETING THE REQUIREMENTS OF 28 U.S.C. § 2254(E)(2)(A) CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS	14
II. THE NINTH CIRCUIT'S DECISION UNDERMINES IMPORTANT PROVISIONS OF AEDPA IN ANY CASE WHERE INCOMPETENCY TO STAND TRIAL IS CLAIMED	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Bryan v. Mullin 335 F.3d 1207 (10th Cir. 2003)	16
Coleman v. Thompson 501 U.S. 722 (1991)	18
Demosthenes v. Baal 495 U.S. 731 (1990)	19
Drope v. Missouri 420 U.S. 162 (1975)	9, 10, 18, 19
Federal Trade Commission v. Minneapolis-Honeywell Co. 344 U.S. 206 (1952)	1
Holland v. Jackson 124 S. Ct. 2736 (2004)	18
Kennedy v. Lockyer 379 F.3d 1041 (9th Cir. 2004)	13
Kenney v. Tamayo-Reyes 504 U.S. 1 (1992)	19
Koste v. Dormire 345 F.3d 974 (8th Cir. 2003)	16
Matheney v. Anderson 253 F.3d 1025 (7th Cir. 2001)	17
Medina v. California 505 U.S. 437 (1992)	10, 16, 18, 19

TABLE OF AUTHORITIES (continued)

	Page
Pate v. Robinson 383 U.S. 375 (1966)	4, 9, 18-20
People v. Marsden 2 Cal. 3d 118 (1970)	6
People v. Pennington 66 Cal. 2d 508 426 P.2d 942 (1967)	4
Roberts v. Dretke 381 F.3d 491 (5th Cir. 2004)	15, 16
Sumner v. Mata 449 U.S. 539 (1981)	19
Thompson v. Keohane 516 U.S. 99 (1995)	19
Townsend v. Sain 372 U.S. 293 (1963)	13, 18
Valdez v. Ward 219 F.3d 1222 (10th Cir. 2000)	14, 15
Walton v. Angelone 321 F.3d 442 (4th Cir. 2003)	16
Williams v. Taylor 529 U.S. 362 (2000)	11-13, 18, 20

TABLE OF AUTHORITIES (continued)

	Page
Constitutional Provisions	
United States Constitution Fourteenth Amendment	2, 9
Statutes	
28 United States Code	
§ 1254(1)	2
§ 2244	2
§ 2254(a)	2
§ 2254(d)	21
§ 2254(e)	2
§ 2254(e)(1)	19, 21
§ 2254(e)(2)	10-22
§ 2254(e)(2)(A)	11, 12, 14, 17, 18, 20
§ 2254(e)(2)(A)(ii)	12
§ 2254(e)(2)(B)	12
California Penal Code	
§ 1367	4
§ 1368	4
California Welfare & Institutions Code	
§ 5150	5, 7
Court Rules	
Rules of the Supreme Court of the United States	
Rule 10(a)	12, 13, 17
Rule 10(c)	12

IN THE SUPREME COURT OF THE UNITED STATES

No.

ERNIE ROE, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

Petitioner, Ernie Roe, Warden, California State Prison, Lancaster, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished amended decision of the Ninth Circuit, No. 02-55143 (October 22, 2004) is contained in Appendix (App.) A at 1a-6a. The unreported order of the District Court is contained in App. B at 7a. The unreported Report and Recommendation of the Magistrate Judge is contained in App. C at 8a-28a. The unreported slip opinion of the California Court of Appeal, Fourth Appellate District, Division Two ("state appellate court"), case numbers E022512/E022548/E023541 (October 8, 1999) is contained in App. D at 29a-40a.

STATEMENT OF JURISDICTION

The amended decision of the United States Court of Appeals for the Ninth Circuit was issued on October 22, 2004. App. A at 1a. Because the amended decision "change[d] matters of substance" (*Federal Trade Commission v.*

Minneapolis-Honeywell Co., 344 U.S. 206, 211 (1952); *compare* App A *with* App. H 48a-52a), the Ninth Circuit advised the parties that judgment was entered on October 22, 2004. App. E at 41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

Section 1 of the Fourteenth Amendment states, in pertinent part, "No State . . .shall deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(a), provides in relevant part that a federal court may entertain a habeas corpus application "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(e), part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 103-132, Stat. 1214, 28 U.S.C. § 2244, et seq., provides as follows:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(iii) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Facts Relating to the Offense

In 1994, Respondent Clifton Maxwell and four other men concocted a plan to find and retake a car which had been stolen from Maxwell. Armed with guns, the men went to one location where one of them shot and wounded a man. 1 RT 169, 171-73, 185, 188; 4 RT 698-706, 712-14. Two days later they went to another location; each man took his pre-assigned place and one of them shot and killed Jerry Jefferson. 4 RT 753, 760-61, 797-98.

Maxwell initially denied any knowledge of the shootings, telling police he was a "straight A student" who does not "go around shooting people." Trial Ex. 118. Later he gave inconsistent statements during taped interviews. Trial Exs. 125, 126, 128 & 130. In each interview Maxwell was talkative, his statements were clear and coherent, and he had no problems expressing himself. He told police he was "very educated" and would not be so stupid as to shoot someone in broad daylight. He stated he was speaking to police because he thought they were "after the shooter" and he wanted to make sure police knew he was not the shooter. Trial Ex. 128.

State Trial Court Proceedings

Maxwell was convicted of first degree murder. He was tried with two of his co-defendants; two juries were empaneled in the courtroom.

Prior to trial, in May 1996, Maxwell's attorney requested a hearing to determine Maxwell's competency to stand trial under Cal. Penal Code § 1368.[1] Four psychologists found Maxwell competent to stand trial and further found he was malingering or at least grossly embellishing a psychosis. 1 RT 6. On December 16, 1996, Maxwell agreed to submit the competency question on the reports. Based on the reports, the trial court found Maxwell competent to stand trial and reinstated criminal proceedings. 1 CT 257; 1 RT 1-6.

Thereafter, Maxwell appeared at several continuance hearings; he was not disruptive. 1 CT 262. In January 1997, new counsel was appointed and requested additional time to prepare for trial because he and Maxwell were "still working on the case and still in the process of preparing for it." 1 CT 266, 268. Thereafter Maxwell was present for several additional continuance hearings; at no time did he act strangely or disrupt court proceedings. 1 CT 280, 286, 288, 291; 2 CT 304.

On January 6, 1998, the judge assigned to preside over Maxwell's trial reviewed the psychological reports and found no change in circumstances. 1 RT 6-7. In finding Maxwell competent to stand trial, the court stated:

---

1. In California competency proceedings initiated under Cal. Penal Code §§ 1367 and 1368 employ the standards set forth in *Pate v. Robinson*, 383 U.S. 375 (1966). *See People v. Pennington*, 66 Cal. 2d 508, 516, 517, 426 P.2d 942, 947-948 (1967).

> [Maxwell's] behavior this afternoon indicates, to me at least, that he, again, is attempting to present a psychotic mental status or trying to in some way suggest by his behavior that he is incompetent to proceed and cannot rationally communicate with his attorney and conduct himself accordingly in this courtroom.

1 RT 7.

In January 1998, defense counsel informed the court at various times that he was concerned about Maxwell's ability to stand trial because Maxwell: (1) was deteriorating; (2) was housed in the jail's psychiatric unit and; (3) was not communicating with counsel. A sheriff's deputy also informed the court that Maxwell was the subject of numerous evaluations under Cal. Welf. & Inst. Code § 5150 and that he was refusing his antipsychotic medication. *See* 1 RT 50-59. While defense counsel stated Maxwell did not want to be present during trial and asked that Maxwell be removed from the courtroom so the jury would not see his disruptive behavior (1 RT 52-53), counsel never declared a doubt as to Maxwell's competency to stand trial. The trial court concluded Maxwell was malingering and trying to feign a psychotic mental state. 1 RT 54.

On January 13, 1998, defense counsel informed the trial court that Maxwell was on suicide watch and would not cooperate to assist counsel in preparing an opening statement. Defense counsel felt he was "betwixt and between" - counsel wanted to make an opening statement but because of how Maxwell communicated with counsel, counsel did not want to make an opening statement that might contradict Maxwell's testimony if he chose to testify. Counsel wanted to ensure the court he was not "neglecting [his] duties to [his] client." Counsel indicated he had spoken with Maxwell the previous Friday at which time he felt Maxwell "would be difficult again and probably would not change his attitude." 1 RT 73-75.

Maxwell asked his attorney to move under *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44 (1970), to be relieved; according to defense counsel, Maxwell said he did not want to come to court to make the request but wanted counsel to make the request for him. 1 RT 74. Maxwell further told defense counsel he did not want to come to court at all and if he did he would be disruptive. 1 RT 76. Counsel stated Maxwell might never want to come to court and that he believed it was in everyone's best interest not to try to forcibly bring Maxwell to court because he could put "a lot of people in danger." 1 RT 76.[2]

The trial court announced that Maxwell had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation. The bailiff had been informed that Maxwell was found holding a razor blade, was mumbling and was bleeding from the nose. The court still found Maxwell was malingering and feigning mental illness so he could present himself in the worst light possible in order to avoid trial. 1 RT 76, 78, 81. The court felt Maxwell elected not to cooperate even though he had the capacity to do so, saying, "He may feel that he is generating appellate issues which might present a better defense than an actual defense at trial to the factual charges." 1 RT 79. Counsel stated that Maxwell asked him to inform the court that he did not want to come to court, that he wanted the court to review the "1368" reports, that counsel should point out to the court that Maxwell had a history of psychiatric problems, that he wanted the court to know he was on medication in jail, and that he had received threatening letters from his co-defendant and witness, Timothy Potts. 1 RT 79. Defense counsel informed the court that Maxwell wanted an "antagonistic approach taken to Mr. Potts" which counsel

---

2. In discussing the defense strategy with the court, defense counsel noted he was "walking a thin line because [he] did not want to reveal even [in] in camera proceedings any confidential communications [he] may have had or [his] client has had with [him]." 1 RT 78.

believed was counter-productive to Maxwell's theory of defense. 1 RT 80. Counsel further noted that Maxwell "clearly ask[ed him] and instruct[ed] him] to turn those letters over" even though counsel urged Maxwell not to do so. 1 RT 80. The court then found Maxwell had voluntarily absented himself from trial and, after defense counsel declined to express a doubt as to Maxwell's competency, noted it did not have a doubt as to Maxwell's competency. 1 RT 80-81.

The next day, counsel indicated that Maxwell had told him he was not willing to come to court, and that he would not behave and conform his behavior to that required in the courtroom. 2 RT 239.

The following day two psychiatrists certified Maxwell for a 14 day hold at the hospital under Cal. Welf. & Inst. Code § 5150. 2 RT 467-68; 4 RT 647-48. Fulfilling its responsibilities, the court stated:

> [S]o we have a very clear record, I do not want this record to suggest or reflect that this Court is proceeding against Mr. Maxwell when he is actually incompetent.
>
> I feel based upon the information that I have on Mr. Maxwell that he is malingering and feigning this situation to put himself in a psychiatric light which indicates his lack of competency to proceed.
>
> I think that is feigned.

2 RT 648-49. The trial court ordered Maxwell's doctor to provide a summary of his impressions of Maxwell "so we can have a clear record." 2 RT 648-649.

The next day, Maxwell appeared in court as ordered by the court. The trial court noted that for the past week, Maxwell had

been housed at the hospital security ward for his own benefit and safety. The court had a one-page faxed note from the hospital, signed by Maxwell's doctor, indicating Maxwell had been cleared to come to court for the past week. When the court asked Maxwell if he wanted to be present during trial, defense counsel stated that Maxwell told him he did not want to be present for trial. 5 RT 838-39. Maxwell stated he would not conform his behavior to that expected in the courtroom and defense counsel agreed. 5 RT 838-39.

The court stated it had no doubt that Maxwell was competent to stand trial. When the court noted that defense counsel had been in continual contact with Maxwell during trial by visiting him at the hospital jail ward, counsel acknowledged he had. The court then asked defense counsel if he was moving for a competency hearing; counsel replied he was not. When asked by the court if he was entertaining any doubt as to Maxwell's competency, counsel stated he was not. 5 RT 840.

When the court again invited Maxwell to remain for trial, Maxwell stated he was not going to sit and "let these people lie on me." 5 RT 840. The court noted that Maxwell was quietly sitting during the proceeding and asked counsel if he wanted Maxwell to remain for trial. Counsel thought Maxwell would be disruptive and should not be present for trial. 5 RT 841-42. Maxwell was not present for trial.

After the jury convicted Maxwell of first degree murder, at sentencing the trial court remarked that it was clear that Maxwell "is competent and was competent to stand trial," and that his attempt to convince the court that he was incompetent had been "totally feigned and fabricated." Sentencing RT at 20.

Post-Conviction Review Proceedings

On direct appeal and in a companion habeas petition before the California Court of Appeal, Maxwell argued the judgment

must be reversed because his Fourteenth Amendment right to due process was denied, claiming he was incompetent to stand trial and the trial court erred by not holding a second competency hearing. App. D at 30a, 32a-35a. The state appellate court affirmed the judgment, holding that under *Pate v. Robinson*, 383 U.S. 375 (1966), California Supreme Court cases citing precedents of this Court, and the evidence presented to the trial court, the trial court did not err in finding Maxwell competent to stand trial, and in not holding second competency hearing. App. D at 33a-35a. The California Supreme Court denied review of the issue. App. M at 72a.

Maxwell then filed a habeas corpus petition in federal district court. A United States Magistrate Judge reviewed Maxwell's claim that the trial court violated Maxwell's Fourteenth Amendment rights when it found Maxwell competent to stand trial and did not hold a second competency hearing. App. C at 11a. The court analyzed Maxwell's claim under AEDPA standards and denied habeas relief because Maxwell failed to demonstrate that the state appellate court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law as set forth in *Pate v. Robinson*, and *Drope v. Missouri*, 420 U.S. 162 (1975). App. C at 11a-20a. The District Court adopted the report and recommendation of the Magistrate Judge. App. B at 7a.

Maxwell appealed the district court's denial of his habeas corpus petition, again maintaining that his Fourteenth Amendment right to due process was violated when the state trial court found him competent to stand trial without holding a second competency hearing.[3] App. A at 2a. In its original

---

3. In support of his appeal, Maxwell submitted to the Ninth Circuit "excerpts of record" which he had never presented to the district court, had never presented to the California Supreme Court in raising this issue in his petition for review, and most of which neither Maxwell nor his trial defense counsel had ever presented to the state trial court when it determined Maxwell was competent to stand trial. Initially, the Ninth Circuit granted

decision, without citing to AEDPA, and without even mentioning the evidentiary hearing requirements set forth in 28 U.S.C. § 2254(e)(2), the Ninth Circuit reversed and remanded for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. H at 49a-52a.

Respondent filed a petition for panel rehearing and suggestion for rehearing en banc. App. I at 53a-68a. The Ninth Circuit voted to deny the petition. App. J at 69a. Respondent filed a motion to recall and stay the mandate pending the filing of a petition for certiorari in this Court. On October 22, 2004, the Ninth Circuit granted the motion to recall the mandate and amended its decision. App. K at 70a. The amended decision again reversed and remanded for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. A at 3a. Citing *Drope v. Missouri*, 420 U.S. 162 (1975), and *Medina v. California,* 505 U.S. 437, 449 (1992), the court stated that a "trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent." App. A at 3a. Additionally, the amended decision held that a petitioner who claims he was incompetent to stand trial is excused from having to demonstrate he was not at fault in failing to develop the factual basis of his claim at trial as required under 28 U.S.C. § 2254(e)(2) to be afforded an evidentiary hearing in federal court. The court added, "A defendant who is incompetent to

---

Warden Roe's motion to strike the inappropriate excerpts. App. F at 44a-45a. On reconsideration, the Ninth Circuit denied the motion to strike without prejudice to Warden Roe raising the issue in its answering brief. App. G at 46a-47a. In its answering brief, Warden Roe again requested the court disregard and strike the inappropriate excerpts as the evidence was not presented to the district court and the trial court. The Ninth Circuit never ruled on Warden Roe's requests. *See* App. A at *passim*; App. I at 66a.

stand trial is also incompetent to develop an adequate factual record or to assist his counsel in doing so." App. A at 2a-3a.

On November 4, 2004, the Ninth Circuit granted Respondent's motion to stay the mandate to January 2, 2005, pending filing of a petition for writ of certiorari in this Court. App. L at 71a.

REASONS FOR GRANTING THE WRIT

With its amended decision in this case, the Ninth Circuit has announced a categorical exception to AEDPA's evidentiary hearing requirements. According to the Ninth Circuit, under 28 U.S.C. § 2254(e)(2), a habeas applicant who alleges he was incompetent to stand trial and seeks an evidentiary hearing on the claim is excused from having to demonstrate he or his counsel could not have developed the factual basis of the claim in state court through the exercise of due diligence. App. A at 2a-3a. Certiorari is warranted because the Ninth Circuit's decision conflicts with the decisions of several other federal courts of appeals and undermines an important provision in AEDPA in an entire category of cases.

AEDPA amended prior law by authorizing federal habeas courts to hold evidentiary hearings only where the claim (1) relies on new, retroactively applicable law or new facts that "could not have been previously discovered through the exercise of due diligence," and (2) based on "the facts underlying the claim "no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A)(B). However, AEDPA imposes these requirements only where "the applicant has failed to develop the factual basis of [the] claim in State court proceedings." §2254(e)(2). In *Williams v. Taylor* 529 U.S. 362, 432 (2000), this Court held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." In this case, the Ninth Circuit held that a habeas

petitioner claiming incompetence to stand trial can *never* possess the requisite fault, thus making §2254(e)(2) altogether inapplicable to that class of claims.

The Ninth Circuit reasoned that a habeas petitioner claiming incompetence to stand trial could not have "assist[ed] his counsel," and that a defendant who cannot assist his counsel can never be at fault for the failure to develop a factual claim in state court. App. A at 2a-3a. This Court was not called upon in *Williams* to address whether a habeas applicant must be able to "assist his counsel" in developing the factual basis of a claim in state court to meet § 2254(e)(2)(A)'s requirements for an evidentiary hearing. The Ninth Circuit filled this void by creating a broad exception to AEDPA's requirements — an exception at odds with the concerns expressed by Congress and this Court to strictly limit habeas corpus evidentiary hearings. Thus, the amended decision raises a serious question which has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

The Ninth Circuit's exception to 28 U.S.C. § 2254(e)(2) also conflicts with decisions of the Fifth, Eighth, and Tenth Circuits. Sup. Ct. R. 10(a). Those circuits require a habeas applicant who claims he was incompetent to stand trial and who failed to develop the factual basis of his claim in state court to show the factual predicate for the claim could not have been previously discovered through the exercise of due diligence by the habeas applicant or his counsel, and that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense as required by 28 U.S.C. § 2254(e)(2)(A)(ii) and (B).

Like the many decisions of the Ninth Circuit which this Court has summarily reversed for disregarding AEDPA's strict limitations on collateral review of state court constitutional adjudications, the Ninth Circuit's creation of a categorical

exception to the requirements of 28 U.S.C. § 2254(e)(2) "yet again runs roughshod over the principles of comity and federalism underlying the Antiterrorism and Effective Death Penalty Act." *Kennedy v. Lockyer,* 379 F.3d 1041, 1069 (9th Cir. 2004) (O'Scannlain, J., dissenting); *see Williams v. Taylor,* 529 U.S. at 436. ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines."). Because of the Ninth Circuit's evident determination in case after case to circumvent AEDPA's strict limitations, this Court's supervisory power is again necessary to secure uniformity of decision by clarifying and "elaborat[ing] the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings." *Townsend v. Sain,* 372 U.S. 293, 310 (1963); Sup. Ct. R. 10(a).

I.

THE NINTH CIRCUIT'S HOLDING THAT A HABEAS APPLICANT WHO ALLEGES HE WAS INCOMPETENT TO STAND TRIAL IS EXCUSED FROM MEETING THE REQUIREMENTS OF 28 U.S.C. § 2254(E)(2)(A) CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

In its amended decision the Ninth Circuit reversed and remanded this case for a "full evidentiary hearing" to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed" regarding Maxwell's competency to stand trial. App. A at 3a. The Ninth Circuit justified its order, not by citation to any controlling authority, but by holding that a habeas corpus applicant who claims he was incompetent to stand trial is excused from having to demonstrate he was not at fault in failing to develop the factual basis of his claim at trial under 28 U.S.C. § 2254(e)(2). This is so, held the court, because "[a] defendant who is incompetent to stand trial is also incompetent to develop an adequate factual record or to assist his counsel in doing so." App. A at 2a-3a.

Prior to the Ninth Circuit's amended decision in this case, no court had held that a habeas applicant who claims he was incompetent to stand trial in state court and seeks a federal evidentiary hearing on the competency claim is excused from the strict requirements of 28 U.S.C. § 2254(e)(2)(A). The Ninth Circuit's amended decision conflicts with the decisions of several circuits, which have required adherence to 28 U.S.C. § 2254(e)(2)(A)'s evidentiary hearing requirements when confronted with requests for evidentiary hearings on competency to stand trial claims.

For example, in *Valdez v. Ward,* 219 F.3d 1222, 1229, 1239-40 (10th Cir. 2000), the petitioner claimed his right to due

process was denied by being tried while incompetent and that the trial court should have re-evaluated his competency during trial. Prior to trial, the petitioner raised the issue of his competency to stand trial and requested a psychiatric examination. *Id.* at 1240. Two experts found the petitioner competent to stand trial. *Id.* at 1240-41. The petitioner was then tried and convicted of first degree murder and sentenced to death. *Id.* at 1227. On collateral review, the petitioner filed a habeas petition in federal district court. The district court denied the petitioner's request for an evidentiary hearing on the ground that petitioner had never requested an evidentiary hearing in state court. *Id.* The Tenth Circuit affirmed the denial of the request for an evidentiary hearing, finding that the petitioner's failure in state court to request an evidentiary hearing constituted a failure to develop the factual basis of the competency claim, thus barring an evidentiary hearing in federal court under 28 U.S.C. § 2254(e)(2). *Valdez,* 219 F.3d at 1230.

Similarly, in *Roberts v. Dretke,* 381 F.3d 491, 494 (5th Cir. 2004), the petitioner alleged the trial court erred in failing to hold a competency hearing and that trial counsel was ineffective in failing to develop evidence concerning the petitioner's mental illness or make use of his court-appointed psychiatrist. The psychiatrist's report concluded it was unnecessary to request a competency hearing. While the trial judge never saw the report, based on his own observations of the petitioner, he declined to hold a competency hearing. *Id.* at 495. The state court rejected the petitioner's claims on direct appeal and on habeas and also rejected a request for an evidentiary hearing. *Id.* at 495-96. On federal habeas, the district court refused to consider affidavits from the petitioner's family members and the petitioner's medical records. The court also denied the petitioner's request for an evidentiary hearing. *Id.* at 500. On appeal, the Fifth Circuit upheld the district court's denial of the petitioner's request for an evidentiary hearing, finding that the petitioner failed to diligently develop the factual basis of his claim in state court because he could have done so "with the resources at his

disposal." *Id.* at 500-01. *See also Koste v. Dormire,* 345 F.3d 974, 985-86 (8th Cir. 2003) (petitioner not entitled to evidentiary hearing on claim that trial counsel was ineffective in failing to request psychiatric evaluation of petitioner; any inadequacy in state court record was largely attributable to petitioner).

Similarly, cases which have affirmed the grant of an evidentiary hearing have done so *only* when the habeas applicant alleged deficiencies in defense counsel's representation in conjunction with an incompetency claim.[4] *See e.g.,*

> •*Bryan v. Mullin,* 335 F.3d 1207, 1214-15 (10th Cir. 2003) (affirming decision of district court to hold evidentiary hearing because it was necessary for district court to consider evidence of petitioner's competency to stand trial to determine validity of ineffective assistance of counsel claim; state conceded petitioner diligently sought to develop the factual basis of the ineffective assistance of counsel claim in state court, thus 28 U.S.C. § 2254(e)(2) requirements met);
>
> •*Walton v. Angelone,* 321 F.3d 442, 451-53 (4th Cir. 2003) (affirming grant of evidentiary hearing only to

---

4. Maxwell has never asserted either on direct state appeal or on collateral review that trial counsel was constitutionally ineffective, thus preserving the veil of attorney-client confidentiality regarding communications he may have had with defense counsel concerning a defense strategy of incompetency to stand trial. Declining to pursue an ineffectiveness claim precludes a reviewing court from hearing relevant evidence from defense counsel who "will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California,* 505 U.S. at 450.

hear evidence relating to performance prong of the ineffective assistance of counsel claim where petitioner raised incompetency claims as well as ineffective assistance of counsel claim related to petitioner's competency to stand trial);

•*Matheney v. Anderson,* 253 F.3d 1025, 1038-39 (7th Cir. 2001)(applying requirements of § 2254(e)(2)(A) and finding petitioner's failure to develop the factual basis of his competency claim caused by trial counsel's deficient representation did not bar an evidentiary hearing with respect to ineffective assistance of counsel claim).

The circuit conflict created by the Ninth Circuit's unwarranted categorical exception to § 2254(e)(2) requires resolution by this Court. The writ of certiorari should be granted so that the ability of habeas petitioners to obtain evidentiary hearings does not depend on the circuit within which they reside. Sup. Ct. R. 10(a).

II.

THE NINTH CIRCUIT'S DECISION UNDERMINES IMPORTANT PROVISIONS OF AEDPA IN ANY CASE WHERE INCOMPETENCY TO STAND TRIAL IS CLAIMED

"The problem of the power and duty of federal judges on habeas corpus, to hold evidentiary hearings – that is, to try issues of fact anew – is a recurring one." *Townsend v. Sain,* 372 U.S. at 309. This Court has been "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor,* 529 U.S. at 436 (citing *Coleman v. Thompson,* 501 U.S. 722, 726 (1991)).

Interpreting the language of §2254(e)(2)(A), in *Williams v. Taylor*, 529 U.S. at 432, this Court held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *See also Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004). Nothing in the language of 28 U.S.C. § 2254(e)(2)(A) exempts a particular specie of claim from its purview; nor, in interpreting § 2254(e)(2), has this Court exempted particular claims from the requirements of § 2254(e)(2)(A).

In its amended decision, the Ninth Circuit adverts to this Court's decisions in *Drope v. Missouri*, 420 U.S. at 162, and *Medina v. California,* 505 U.S. at 449, noting that a "trial judge has a continuing, affirmative responsibility to ensure that a defendant is not tried while incompetent." App. A at 3a. In *Drope*, this Court held that the criminal trial of an incompetent defendant violates due process . 420 U.S. at 172-73. In *Pate v. Robinson,* 383 U.S. 375, 385 (1966), the Court held that a defendant may not waive his right to have a trial court determine his competency to stand trial. The Ninth Circuit

apparently viewed that holding as necessarily meaning that a defendant also cannot "fail to develop" an incompetency claim in state court within the meaning of §2254(e)(2). That conclusion is demonstrably wrong.

Nothing in *Drope*, *Medina*, or *Pate* relieves a habeas applicant from attempting in state court to develop the factual basis of an incompetency claim in order to be afforded an evidentiary hearing in federal court. Just as a state may presume a defendant is competent and place the burden on him to prove his incompetence by a preponderance of the evidence (*Medina v. California*, 505 U.S. at 449, 451, 453), so too may Congress require a habeas applicant or his counsel to develop the factual basis of an incompetency claim in state court. Neither requirement denies a habeas applicant his right to due process or lessens the deep-rooted principle that a criminal defendant who is incompetent should not be required to stand trial. *Id.* at 447.

Requiring a habeas applicant to meet the evidentiary hearing requirements of § 2254(e)(2) respects Congress' determination through AEDPA and this Court's holdings that state court competency determinations are factual findings entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1); *Thompson v. Keohane,* 516 U.S. 99, 111 (1995); *Demosthenes v. Baal,* 495 U.S. 731, 735 (1990). "Deferring factfinding to later federal court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Kenney v. Tamayo-Reyes,* 504 U.S. 1, 9 (1992). Encouraging full factual development in state court "reduces the 'inevitable friction' that results when a federal habeas court 'overturn[s] either the factual or legal conclusions reached by the state-court system'" *Id.* at 9 (quoting *Sumner v. Mata,* 449 U.S. 539, 550 (1981)).

The Ninth Circuit's amended decision undermines those principles by diminishing the importance of state court proceedings and increasing the clashes between state and federal

courts. AEDPA, by contrast, seeks to lessen state-federal clashes by providing that "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams,* 529 U.S. at 433. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. In the context of an incompetency to stand trial claim, a habeas applicant can fulfill the requirements of § 2254(e)(2) either by attempting to present evidence of incompetency at trial, or by alleging on collateral review that defense counsel was ineffective in failing to investigate his client's competency, failing to present evidence at trial of that incompetency, failing to request a competency hearing, or failing to ensure the trial court made findings at a competency hearing. Maxwell did neither.

Under AEDPA, if a habeas applicant fails to develop the factual basis of his claim in state court and, like Maxwell (who was represented by counsel at trial, on direct appeal, and in state and federal collateral review), fails in state court to request an evidentiary hearing to develop the claim, a federal court is prohibited from holding an evidentiary hearing on the claim. 28 U.S.C. § 2254(e)(2)(A). There is no reason why a different standard should apply to a habeas applicant raising an incompetency to stand trial claim. To give effect to the presumption of correctness to be afforded state court factual findings and the evidentiary hearing requirements of AEDPA, particularly in light of the difficulties inherent in making retroactive competency determinations (*Pate,* 383 U.S. at 387), a habeas applicant should be required to fully develop the factual basis of his incompetency to stand trial claim in state court.

In reversing and remanding for a full evidentiary hearing on Maxwell's competency claim based on "both the facts in the record and the facts a 'more complete inquiry' by the trial court

could have revealed (App. A. at 3a, 7a), the Ninth Circuit relied not on AEDPA, but on its own jurisprudence, noting that "Maxwell 'was entitled to a hearing on his competency to stand trial if a reasonable judge would have . . . a "bona fide doubt" [as to] competence.'" App. A at 2a. Yet, as the district court correctly observed in denying Maxwell's habeas petition, "Federal courts assessing habeas petitions thus review the record to determine whether evidence before the state trial court raised such a 'bona fide doubt' so as to require a '*Pate* hearing.'" App. C at 16a. Such review "is not *de novo.* Relief is available only if the state adjudication (1) is contrary to, or unreasonably applied, federal law as determined by the Supreme Court, or (2) stands upon an unreasonable factual finding in light of the evidence. 28 U.S.C. § 2254(d)(1), (2)." App. C at 16a.

By its decision, the Ninth Circuit has inappropriately initiated a process of *de novo* review of the trial court's competency determination by ordering a full evidentiary hearing which, in turn, calls for a *de novo* determination of Maxwell's competency to stand trial. In so doing the Ninth Circuit: (1) afforded no deference to the decision of the California Court of Appeal under § 2254(d); disregarded numerous implied and express factual findings made by the trial court before, during and after trial concerning Maxwell's competency to stand trial, and by the state appellate court which found the trial court was not presented with evidence of changed circumstances or of incompetency to warrant a second competency hearing as required by § 2254(e)(1)(App. D at 33a-35a); (2) ignored the fact that at trial defense counsel met with Maxwell almost daily and repeatedly declined to express a doubt as to Maxwell's competency and to request a competency hearing (*see* 1 RT 54; 5 RT 840); and (3) did not consider the fact that neither in state court nor in the district court did Maxwell ever seek an evidentiary hearing on his claim, develop the factual basis of his claim as required by § 2254(e)(2), or allege that counsel was ineffective for declining to express a doubt, for not asking for a

competency hearing or for not investigating and presenting additional evidence as to Maxwell's competency. Under the rule adopted by the Ninth Circuit in this case, this will be true in virtually every case where a habeas petitioner seeks an evidentiary hearing with respect to an incompetency to stand trial claim.

This Court should not permit the Ninth Circuit to ignore the strict limitations AEDPA imposes on federal habeas review of state convictions. Each year numerous habeas applicants raise incompetency to stand trial claims. By its amended decision, the Ninth Circuit has guaranteed each of those applicants an evidentiary hearing on his claim. Given the frequency with which this issue arises, the extent to which the Ninth Circuit's decision undermines Congress's objectives in enacting § 2254(e)(2), and the conflict among the circuits on the issue, this Court should grant certiorari.

CONCLUSION

Accordingly, the State respectfully requests a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated: December 29, 2004

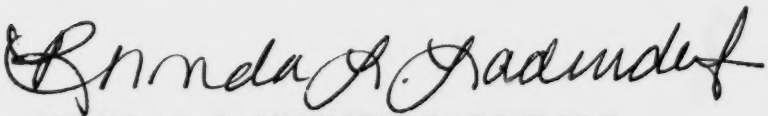
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General



RHONDA L. CARTWRIGHT-LADENDORF
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDICES

INDEX TO APPENDICES

APPENDIX A
United States Court of Appeals
For the Ninth Circuit
Amended Decision 1

APPENDIX B
United States District Court
Central District of California's
Order 7

APPENDIX C
Unites States District Court
Central District of California's
Report and Recommendation
of the United States Magistrate Judge 8

APPENDIX D
California Court of Appeal
Fourth Appellate District
Division Two's Opinion 29

APPENDIX E
United States Court of Appeals
For the Ninth Circuit's
Notice of Entry of Judgment 41

APPENDIX F
United States Court of Appeals
For the Ninth Circuit's
Order 44

APPENDIX G
United States Court of Appeals
For the Ninth Circuit's
Order 46

APPENDIX H
United States Court of Appeals
For the Ninth Circuit's
Memorandum 48

APPENDIX I
Respondent's Petition for Rehearing
and Suggestion for Rehearing En Banc 53

APPENDIX J
United States Court of Appeals
For the Ninth Circuit's
Order 69

APPENDIX K
United States Court of Appeals
For the Ninth Circuit's
Order 70

APPENDIX L
United States Court of Appeals
For the Ninth Circuit's
Order 71

APPENDIX M
California Supreme Court
Order 72